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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VERNON BRITTEN,

Defendant and Appellant.

A143848

(San Mateo County
Super. Ct. No. SC038485A)

I. INTRODUCTION

In July 2013, Vernon Britten filed a petition to recall his sentence under Penal Code section 1170.126, a provision of the Three Strikes Reform Act of 2012, which was enacted pursuant to Proposition 36 (the Act or Proposition 36).¹ In October 2014, the trial court denied Britten's petition on the ground that releasing him from prison would pose an unreasonable risk of danger to public safety.

In November 2014, Britten filed a second petition to recall his sentence under the Act based on the theory that the criteria for assessing whether a defendant poses an unreasonable risk of danger to public safety changed in November 2014, after California voters approved Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47). On the same ground, Britten sought reconsideration of his first petition. The trial court denied Britten's second petition and his motion for reconsideration.

¹ Statutory references are to the Penal Code unless otherwise stated.

Britten appeals from all three orders, contending the trial court committed reversible errors by (1) finding that he poses a present danger to the public; and (2) refusing to evaluate his suitability for resentencing under the standard established by Proposition 47. We reject these contentions and affirm the appealed orders.

II. BACKGROUND

A. Britten's 1996 Offenses and Third Strike Sentence²

On April 4, 1996, Britten and his then girlfriend, Debra Moore, went out for dinner and drinks. While leaving the restaurant, they began to argue and Britten accused Moore of disrespecting him. After they returned home, got into bed and said goodnight to each other, Britten attacked Moore, choking her until she briefly blacked out; pinning her down with his knee; punching her twice in her face; and repeatedly hitting her in the back of her head. Moore was unable to get away from Britten until other residents of the home intervened. When Moore asked another resident to call the police, Britten ripped the phone cord out of the wall. The next morning, Moore moved out of the home, sought medical attention and contacted the police.

The April 4 incident resulted in felony charges against Britten. At his October 1996 jury trial, Britten testified that Moore started the April 4 altercation and that he was only defending himself. The prosecution elicited admissions from Britten that he served prison terms for a 1991 felony conviction for abuse of a cohabitant; a 1988 second degree robbery conviction; and a 1984 robbery conviction. Britten was also asked about, but could not recall, several other incidents, including two thefts he committed in 1981, and numerous violent altercations with police during the 1980's.

On October 10, 1996, the jury found Britten guilty of three counts: abuse on a cohabitant (§ 273.5, subd. (a)); assault with a deadly weapon (§ 245, subd. (a)(1)); and

² Our factual summary is based primarily on a decision by a former panel of this court affirming the judgment that resulted in Britten's current sentence. (*People v. Britten* (Mar. 31, 1998, A076662 [nonpub. opn.]).) Pursuant to Evidence Code section 452, we take judicial notice of this appellate decision, which was also Exhibit 4 in a binder of exhibits that the trial court reviewed at the hearing on Britten's petition. For reasons that are not clear to us, this binder is not part of the appellate record.

false imprisonment (§ 236). The trial court found that several sentencing enhancement allegations were true, including that Britten had two prior strikes and that he had served three prior prison terms. (§§ 1170.12, subd. (c)(2), 667.5, subd. (b).) Britten was sentenced to an aggregate term of 28 years to life.

B. Proposition 36

On November 6, 2012, voters approved Proposition 36, which changed “the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment.” (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*).) “Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citations.]” (*Id.* at pp. 167-168.)

“The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)” (*Yearwood, supra*, 213 Cal.App.4th at p. 168.)

C. Britten’s First Petition

In a July 30, 2013 petition, Britten alleged that he was statutorily eligible for resentencing under Proposition 36 because he is serving a sentence of 28 years to life pursuant to the three strikes law; his current offenses are not serious or violent felonies as defined by the Act; and he has not been convicted of any disqualifying offenses. (See § 1170.126, subd. (e).) Britten further alleged: “Petitioner is suitable for and merits resentencing, in that he will pose no unreasonable danger to the public if re-sentenced. Petitioner’s entire record will show that petitioner has maintained a record of good conduct for years in custody; that he has exceptional support from prison staff; that he

has achieved insight and has altered his behavior; and that he has excellent family support and release plans; and that he therefore poses no unreasonable danger to the public if released.” (See § 1170.126, subd. (f).)

On September 6, 2013, the People conceded that Britten was eligible for resentencing under the Act, but did not concede that his petition should be granted. Counsel was appointed for Britten, and the court and parties discussed stipulations for protective orders with respect to the production of Britten’s medical and prison records. The matter was continued so those records could be produced and reviewed. Apparently the process took several months. Eventually, a hearing on the merits of Britten’s petition was set for October 3, 2014.

On September 19, 2014, the People filed a “Brief Re: Suitability for Resentencing Under P.C. 1107.126,” which stated that they had not yet taken a final position on Britten’s suitability for resentencing because they anticipated receiving additional material from Britten. In the meantime, the People provided the court with pertinent evidence by filing a “binder of exhibits” along with their brief. That binder included several documents pertaining to Britten’s 1996 convictions and sentence (Exhibits 1-3); a 1998 unpublished decision by this court affirming the 1996 judgment and third strike sentence (Exhibit 4); a police report pertaining to a prior incident of domestic violence which resulted in a 1991 conviction (Exhibit 5); records from the California Department of Corrections and Rehabilitation (CDCR) documenting Britten’s history of incarceration and parole dating back to February 11, 1985 (Exhibit 7); and CDCR disciplinary records (Exhibit 8). The People also filed a separate set of excerpts from medical and mental health records that had been produced by the California Correctional Health Care Services, along with a request that the material be filed under seal to protect Britten’s privacy.

In a brief filed September 26, 2014, Britten argued that the trial court was required to resentence him to a two-strike sentence because his eligibility was undisputed and because the record affirmatively showed that Britten would not be a danger if he was released from custody. As support for this argument Britten attached several exhibits to

his brief, including: (1) a psychological evaluation prepared by Dr. Douglas Korpi, Ph.D., who evaluated the risk that Britten would violently reoffend as low; (2) a report by Richard Subia, a former prison warden who was retained as a consultant for Britten and concluded he did not pose a significant risk of reoffense; (3) a letter of support from Jacques Verduin, director of rehabilitation programs at San Quentin; (4) a plan discussing what Britten would do if released into the community; and (5) and letters of support from prison staff and family members.

D. The Order Denying Britten's First Petition

On October 3 and October 24, 2014, the trial court held an evidentiary hearing on the merits of Britten's petition. At the conclusion of the hearing the court announced its decision.

1. The Evidence

The People opposed the petition on the ground that releasing Britten would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) As support for their position, the People relied on the binder of evidence they previously submitted; additional exhibits from Britten's 1996 trial; and the medical and mental health records that were filed under seal.

Britten argued that the People could not carry their burden of proving he was a danger to public safety because the record proved otherwise. As support for this position, Britten relied on the documentary evidence he previously submitted, and also elicited testimony from several witnesses.

Richard Subia, a public safety consultant with over 25 years of experience working for the CDCR, testified as an expert in the areas of CDCR records, discipline systems, mental health delivery systems and prison gangs. The court found that Subia also qualified as an expert with respect to institutional risk assessment, but that he was not "an expert in the category of risk to the community." Subia testified that he did not find anything in Britten's prison records that caused him to be concerned about the risk that Britten would reoffend. For the past 10 years, Britten has been placed in a level two custody classification, which is the lowest level a life inmate can receive. His discipline

records document only six serious infractions, none within the past 10 years, and several less serious violations, the last of which was in 2007. In 2009, Britten was “validated” as a member of the KUMI 415 gang, but he was never placed in segregated housing, which showed that he was not viewed as a threat to the prison population.

Under cross-examination, Subia acknowledged that he did not know the details pertaining to Britten’s domestic violence offenses. When Subia asked Britten about the April 1996 incident, all Britten said was that a woman jumped on him so he hit her and pushed her off of him. During his testimony, Subia also acknowledged that because Britten has been housed with male prisoners, he has had very little contact with women during the period of his incarceration.

Jacques Verduin, a rehabilitation director at San Quentin, facilitates the prison’s “GRIP” program, a comprehensive offender accountability program. Verduin testified that Britten participated in the program from November 2012 until November 2013. Verduin testified that Britten was a positive force in the class and one of his best students because of his enthusiasm and willingness to share his struggles with the group.

Douglas Korpi is a psychologist who testified as Britten’s expert in the field of forensic psychology, the diagnosis of mental disorders and the evaluation the risk of violent reoffense.

Based on his review of medical and mental health records, Korpi concluded that Britten suffers from a personality disorder that is some combination of antisocial and dependent personality, and that he is “pretty close” to “fully antisocial.” Britten also has substance abuse problems (alcohol and marijuana), which are in institutional remission. While in prison, Britten was diagnosed with depression 100 times and major depression 40 times. He was also diagnosed with schizophrenia a few times, but Korpi disagreed with that diagnosis. Korpi described Britten as a “consummate follower, somebody who looks to others for guidance, support, nurturing, who literally depends on others for much of his kind of life direction.”

According to Korpi, Britten is a “big consumer of mental health services” because he needs to be told that he is a good person. He has been treated with three prescription

medications for his mental health issues for “the better part of the past 15 years at least.” The most recent prescription documented in the record was given in December 2013, but Korpi testified that the record is “kind of . . . confusing,” and it seemed to him that pieces of it were missing.

Korpi used a “risk assessment scale” to assess the likelihood that Britten will reoffend. Based on that assessment, Korpi concluded that Britten is a person who would have “been easily classified” as having a high risk to violently reoffend at an earlier point in his life, but that recent behavior and current attitudes “suggest that he’s at low risk at this point.” The record of Britten’s “rule violation behavior” while in prison supports this conclusion, Korpi testified, because it shows a “clear downward trend,” with all of Britten’s “truly violent behavior” occurring before the age of 34, his less violent behavior (fights in prison) occurring between ages 35 and 45, and then no write-ups at all after the age of 46.

Korpi acknowledged that Britten possesses every historical risk factor for committing a violent reoffense, including a history of violence, unemployment, mental illness, violent attitude, and parole violations. If a 40-year-old man had the risk factors Britten has, Korpi would have concluded there was a high risk for violent reoffense. However, Korpi offered the opinion that the risk Britten would reoffend was low because of his age, his last six years of good behavior in prison, and the fact that he can “conceptualize[] his future.”

Under cross-examination, Korpi acknowledged that when he interviewed Britten in September 2014, Britten received a score of 26 out of 30 on the psychopathy scale, “[w]ith 30 being a true psychopath.” However, Korpi maintained that Britten was not psychotic, and that the few mental health providers who concluded he was did not realize that he was lying about experiencing hallucinations. According to Korpi, Britten lied to mental health providers because: “He liked getting sleep meds. He liked getting attention. He liked talking to them.” Evidence of Britten’s malingering and his high psychopathy score were concerning, but not particularly relevant to Korpi’s assessment of the risk of violent reoffense. As Korpi explained, “In my mind, it’s a problem that he

lies. Does lying correlate with reoffense, not a whole lot.”

Korpi testified that the reason that Britten would lose self-control and become violent was not mental illness, but his personality disorder. Korpi acknowledged that Britten does have a “problem with women,” but explained that the assessment tools he used are not refined enough to distinguish between genders. According to Korpi, “[a]ll we can say is his risk for overall violence whether it be to a man or woman was high at one point but now is lower.”

Korpi acknowledged that Britten’s plan to become a caretaker for his mother who is suffering from cancer is likely to cause him stress, and that the fact that he is dependent on others to tell him what is the right thing to do will be a big risk factor. Nevertheless, Korpi concluded that the risk of violent reoffense is still low for the following reason: “The question becomes a 56-year-old man, what is the likelihood that he would turn back to hoodlums, et cetera, or go to the local, you know old man center where young teenagers feed them and—he’s not going to be the kind of guy that can hang with a criminal lifestyle anymore. It would be too hard to do that. It would be much easier to avail himself of social services, of his daughter’s comfort, of other people who are more pro-social.

Under cross-examination, Korpi also acknowledged that Britten does not have insight regarding his psychological functioning and likely does not recognize domestic violence in himself. Britten’s mental health records indicate that he can become angry when his routine is changed and when he feels he is being disrespected. He has described his anger management technique as taking a deep breath and letting the anger “float[] away.” According to Korpi, this type of language from Britten is “a bunch of bunk.” Korpi testified that these are just “words he learned from his therapist, and I think he’s just parroting them.”

Britten testified that he is 52 (not 56, as Korpi appeared to assume) and that he has been in prison for over 18 years. Britten acknowledged his prior crimes, including two domestic violence offenses, by affirming details about the events that were outlined by his trial attorney, but he did not actually describe the events himself.

When asked how he has changed, Britten explained that he grew up as the type of person who goes to church, but he became angry when he started hanging out in the projects. He continued to be an angry person until he was sent to prison. Britten testified that “I learned from this—this life sentence that I have created that I did to maintain my anger by just getting in groups. [¶] And through this whole prison term . . . [t]hey didn’t have groups until I got to San Quentin state prison. And that’s where I learned how to control and work with my anger.”

Britten testified that his problems with women stemmed from the fact that they would “belittle” him; they would call him a “mama’s boy,” or tell him he was “no good.” He would do something right, but they would “turn the table” and say he was not doing it right, which would make him upset. When he got upset, he got angry, disrespected or humiliated, and then he would lose control, and it “goes from there.” According to Britten, the “difference . . . now” is that during the last eight years he has received help from a therapist and from groups that “let me understand what violence really is and what anger is all about.”

2. The Trial Court’s Ruling

The trial court found that Britten genuinely believed he would succeed in living a nonviolent life if he was released from prison, but it concluded that this belief was “completely unrealistic.” While Britten had done well in prison, the evidence showed that he did not understand the challenges he would face or have sufficient knowledge of what “could set him off.” The court acknowledged that Proposition 36 does not disqualify all defendants who committed violent offenses and that Britten’s domestic violence convictions are not violent or serious offenses within the meaning of Proposition 36. Nevertheless, the court found that, as a factual matter, those crimes were “incredibly violent, scary violent.” The court also acknowledged that friends and family really wanted Britten to be released, but concluded that those desires could not influence its decision.

The trial court also explained why Britten’s witnesses did not convince the court that Britten no longer posed a present threat of danger. Subia, the former prison warden,

minimized evidence of Britten’s domestic violence. Verduin’s testimony showed that Britten participated in a domestic violence course while in prison, but that fact was not determinative because other evidence showed that Britten “has not been honest with the mental health professionals for whatever reason.” Finally, Dr. Korpi’s risk assessment was not convincing because he placed too much weight on Britten’s age and prison discipline record and insufficient weight on Britten’s history of violent behavior. Under all these circumstances, the court concluded that Britten “still presents an unreasonable risk of violence.” Accordingly, the court denied Britten’s petition for resentencing.

An October 24, 2014 minute order memorialized the court’s ruling as follows: “The court finds that petitioner/defendant’s beliefs that he will succeed in the outside world are unrealistic[.] [¶] Though the defendant has done good work in prison, the court finds that he is an unreasonable risk to the public[.] [¶] Petitioner/defendant’s petition for resentencing is denied[.] [¶] Petitioner/defendant is remanded to CDCR to serve the balance of his sentence.”

E. Proposition 47

On November 4, 2014, a few weeks after Britten’s resentencing petition was denied, California voters approved Proposition 47. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328.) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)

“ ‘Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person “currently serving” a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose

an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) [Citation.]” (*People v. Contreras* (2015) 237 Cal.App.4th 868, 891.)

Section 1170.18, subdivision (c) states: “As used throughout this Code, ‘unreasonable risk of danger to public safety’ means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.” The referenced provision of section 667 contains a list of specific felonies including certain sexually violent offenses and sex offenses against young minors; homicide offenses; solicitation to commit murder; assault on a peace officer with a machine gun; possession of a weapon of mass destruction; and offenses punishable by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv).)

F. Britten’s Second Petition and Motion for Reconsideration

On November 5, 2014, Britten filed a second petition for resentencing under Proposition 36. Britten argued that Proposition 47 “change[d] the standard for determining ‘unreasonable risk of danger to public safety,’ ” by adding section 1170.18, subdivision (c) to the Penal Code. Britten further argued that he does not pose an unreasonable risk of danger under that standard because he has never committed any of the felony offenses referenced in section 667, subdivision (e)(2)(C)(iv), and there is no danger he will commit such an offense in the future if he is released from prison. Therefore, Britten concluded that the court was required to grant his petition and resentence him to a second strike sentence pursuant to Proposition 36.

On December 2, 2014, Britten filed a motion to reconsider the order denying his original resentencing petition. According to Britten, reconsideration was proper under the court’s inherent authority, and because a change in the law was a well-recognized ground for reconsideration of a ruling. Britten argued that section 1170.18 changed the law governing petitions for resentencing under Proposition 36 by clarifying the definition of “unreasonable risk of danger to public safety,” and that he was entitled to the benefit of that new definition.

The People opposed Britten’s second petition and motion for reconsideration on

the grounds that Britten was not entitled to readjudication of a sentencing matter; Britten did not qualify for relief under Proposition 47; and, even if section 1170.18 could be applied to petitions filed under Proposition 36, the new provision did not apply retroactively.

After a December 17, 2014 hearing, the trial court denied Britten's motions, finding that Proposition 47 does not apply to a petition for resentencing under Proposition 36.

III. DISCUSSION

A. The Finding of Present Dangerousness

Britten first contends that the trial court abused its discretion under section 1170.126 by finding that releasing Britten from prison would pose an unreasonable risk of danger to public safety.

As noted above, there is no dispute that Britten is eligible for resentencing under Proposition 36. However, under the statutory procedure set forth in the Act, resentencing does not automatically follow from eligibility. Instead, if a petitioner meets the statutory eligibility requirements, section 1170.126, subdivision (f) provides that he or she must be resentenced to a second strike term unless the trial court, "in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

Section 1170.126, subdivision (g) further provides: "In exercising its discretion in subdivision (f), the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety."

Because section 1170.126 vests “ ‘discretionary power . . . in the trial court,’ ” the court’s “ ‘exercise of that discretion “must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” ’ [Citation.]” (*People v. Williams* (2013) 58 Cal.4th 197, 270-271.) Applying this standard, we conclude that the trial court properly exercised its discretion in this case. As discussed above, at the October 2014 hearing, the trial court considered the relevant factors outlined in section 1170.126, subdivision (g), including Britten’s criminal history, disciplinary record, record of rehabilitation and post-release plans. After weighing all this evidence, the court concluded that Britten continued to pose a present risk of danger to public safety.

Britten advances a two-pronged attack on the trial court’s discretionary ruling. First, he argues that he made an “extensive showing of his current lack of violent tendencies.” The apparent purpose of this lengthy argument is to demonstrate that the court must have abused its discretion by failing to credit Britten’s interpretation of the evidence. But, Britten literally ignores the binder of exhibits and other evidence produced by the People. Furthermore, his one-sided recitation of the evidence fails to distinguish between the facts that were established and the inferences that Britten wanted the court to draw from those facts.

In any event, Britten’s real dispute is with the weight that the trial court afforded to various pieces of evidence. It is not our role to reweigh the evidence on appeal. “Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance. [Citation.]” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; see also *People v. Carmony* (2004) 33 Cal.4th 367, 375 [“ ‘Discretion is the power to make the decision, one way or the other.’ [Citation.]”].)

Britten’s second theory is that the records contains “no evidence that he is currently dangerous.” In his opening brief, Britten argues that the concept of an

unreasonable risk of danger to public safety as used in Proposition 36 “probably” means the same thing as the “similar concept” in section 3041, which is used to make parole decisions, and, under that similar provision, a denial of relief must be supported by some evidence that the prisoner remains a *current* threat to public safety. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1210; *In re Shaputis* (2008) 44 Cal.4th 1241, 1254.) Thus, Britten posits, the absence of any evidence that he is presently dangerous compels the conclusion that the trial court abused its discretion in this case.

After Britten filed his opening brief, the question of whether evidence of current dangerousness is required to establish an unreasonable risk of danger to public safety under Proposition 36 was squarely addressed in *People v. Esparza* (2015) 242 Cal.App.4th 726 (*Esparza*). The parties now appear to agree that *Esparza* is the controlling authority on this issue.

Esparza involved a petition for resentencing under Proposition 36 that was filed by a defendant who was serving a 25-year-to-life sentence for two felony convictions for driving under the influence of alcohol with three or more prior “DUI” convictions. (*Esparza, supra*, 242 Cal.App.4th at p. 730.) The trial court acknowledged that the petitioner did not have a history of being violent, and it also stated that the petitioner’s prison record was probably “ ‘the most stellar’ ” the court had seen. Nevertheless, the court found that petitioner was a danger to public safety because he was “ ‘an alcoholic who cannot control himself in the community.’ ” (*Id.* at p. 734.) The court based its ruling on the petitioner’s record of serious alcohol related offenses, and on the fact that he had not started participating in Alcoholics Anonymous (AA) until a few months before filing his petition. The court stated that this fact supported an inference that petitioner was not sincere about addressing his drinking problem. (*Ibid.*)

On appeal, the *Esparza* court reversed, concluding that the trial court erred by basing its decision on an inference regarding the petitioner’s lack of sincerity, which was in turn based on a fact that had not been proven by the People. Indeed, there was evidence in the record that petitioner had been participating in AA for a few years. (*Esparza, supra*, 242 Cal.App.4th at pp. 744-745.) Ultimately, the *Esparza* court

remanded the matter for further proceedings, offering the following additional observations as guidance to the trial court:

“Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, we believe that the proper focus is on whether the petitioner currently poses an unreasonable risk of danger to public safety. [Citations.] Further, we believe that a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history ‘only if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety. [Citation.]’ [Citation.] ‘ “[T]he relevant inquiry is whether [a petitioner’s prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is . . . an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner’s criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate’s psychological or mental attitude. [Citation.]” [Citation.]’ [Citation.]” (*Esparza, supra*, 242 Cal.App.4th at p. 746, italics omitted.)

In the present case, the trial court’s ruling complies with the guidelines set forth in *Esparza, supra*, 242 Cal.App.4th at page 746. To be sure, the court was concerned about Britten’s violent history, including particularly his history of domestic violence. However, unlike the trial court in *Esparza*, this trial court also considered extensive evidence regarding Britten’s current circumstances. Ultimately, the court concluded that despite the passage of time and the “good work” Britten did in prison, he still poses a current threat to public safety because, among other things, he does not have insight about the challenges he will face if he is released, and he does not have the ability to diffuse situations that are likely to “set him off.” In other words, this trial court did not base its ruling solely on immutable facts about Britten’s history.

Britten contends that the trial court’s conclusion that he continues to present an unreasonable risk of danger to public safety was nothing more than a “hunch” because

there is no evidence to support the court’s “prophesy” that something will happen to him in the community that will “set him off.” This argument misconstrues the issue before the trial court and mischaracterizes the evidence pertinent to that issue.

The inquiry before the trial court was by definition predictive. Britten’s prison discipline record is not the only or even the best predictor of how Britten will behave if he is released from that highly structured environment where he lives exclusively among a population of men convicted of crimes. To the extent some evidence of current dangerousness is required to support the trial court’s exercise of its discretion under section 1170.126, Britten’s own expert psychologist supplied that evidence. Korpi’s testimony is evidence that Britten suffers from a personality disorder, which makes him beholden to others for validation; lies to mental health care providers in order to secure medication and personal attention; is very close to “fully antisocial”; lacks insight about his psychological functioning and his problems with women; can become angry when his routine changes or he feels disrespected; and places his faith in an anger management technique that is “a bunch of bunk.”

In sum, the record demonstrates that the trial court considered all the pertinent factors set forth in section 1170.126, subdivision (g) before making its decision, and that there is evidence that Britten currently poses an unreasonable risk of danger to public safety. Therefore, the trial court did not abuse its discretion by denying Britten’s petition for resentencing under Proposition 36.

B. The Court Did Not Err by Refusing to Apply Proposition 47

Britten contends the trial court erred by refusing to consider whether he is suitable for resentencing under Proposition 36 by applying the standard set forth in section 1170.18, subdivision (c), which was added to the Penal Code as part of Proposition 47.³

³ The question whether Proposition 47’s definition of unreasonable risk of danger to public safety applies to resentencing petitions filed under Proposition 36 is currently pending before the Supreme Court. (*People v. Channey* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.)

As discussed above, under pertinent provisions of Proposition 36—section 1170.126, subdivisions (f) and (g)—a trial court has broad discretion to consider a variety of potentially relevant factors in order to determine whether resentencing a three strike inmate to a two strike sentence would pose an unreasonable risk of danger to public safety. Crucially, Proposition 36 does not restrict the trial court’s discretion by defining unreasonable risk of danger to public safety in reference to specific crimes that pose such a danger. By contrast, section 1170.18 does impose such a restriction on trial courts that adjudicate petitions under Proposition 47. Under section 1170.18, subdivision (c), an unreasonable risk of danger to public safety “means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.” The felonies listed in that provision of section 667 include only particularly heinous sex, homicide and weapons offenses, and crimes punishable by life imprisonment or death. (*Ibid.*)

In the present case, both of Britten’s petitions were filed under Proposition 36 (§ 1170.126) as opposed to Proposition 47 (§ 1170.18). Furthermore, indisputably, Britten does not qualify for resentencing under Proposition 47. As discussed above, under Proposition 47 an inmate currently serving a felony sentence for an offense that is now a misdemeanor under Proposition 47 may petition to have his sentence recalled and to be resentenced to a misdemeanor. (§ 1170.18.) Britten is not currently serving a felony sentence for an offense that is now a misdemeanor under Proposition 47. Thus, the trial court’s assessment whether resentencing him would pose an unreasonable risk of danger to public safety was governed by section 1170.126, subdivisions (f) and (g), not by section 1170.18, subdivision (c).

Britten’s contrary position is based on language in section 1170.18, subdivision (c) which states: “As used throughout this Code, ‘unreasonable risk of danger to public safety’ means” Britten points out that section 1170.126, subdivision (f) is part of the Penal Code, and that this provision of Proposition 36 uses the term “unreasonable risk of danger to public safety.” Therefore, Britten concludes that term must necessarily be defined in accordance with section 1170.18, subdivision (c).

This same argument was made and rejected in *Esparza, supra*, 242 Cal.App.4th 726. The *Esparza* court acknowledged that “as a matter of grammatical construction,” Proposition 47’s definition of unreasonable risk of danger to public safety is tied to the words “As used throughout this Code.” (*Id.* at p. 736.) However, the court concluded that adopting this “literal construction” of section 1170.18, subdivision (c) would conflict with the intent of the voters who approved Proposition 47. (*Ibid.*; see, e.g., *People v. Briceno* (2004) 34 Cal.4th 451, 459 [“ ‘our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.’ ”].) As support for this conclusion, the *Esparza* court highlighted three facts.

First, by approving Proposition 47, California voters did not indicate that they intended to adopt a definition of an unreasonable risk of danger that would apply to Proposition 36 petitioners. (*Esparza, supra*, 242 Cal.App.4th at pp. 736-737.) According to the official ballot pamphlet, the intent of Proposition 47 was to reduce penalties for “ ‘certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors.’ [Citation.]” Proponents of the measure also intended that the court would not be required to resentence such an offender if it was likely that the offender would “ ‘commit a specified severe crime.’ [Citation.]” (*Id.* at p. 736.) Thus, the intent of the measure was to stop “ ‘wasting prison space on petty crimes and focus law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors’ [Citation.]” (*Ibid.*) Furthermore, although a key part of the measure was a resentencing procedure that was modeled to some extent on Proposition 36, the Voter Information Guide did not even mention the passage Proposition 36, “which occurred only two years before.” (*Id.* at p. 737.)

Second, it would be illogical to conclude that voters intended to change the three strikes law by redefining some felonies as misdemeanors. (*Esparza, supra*, 242 Cal.App.4th at p. 737.) The “new, narrower definition of “ ‘unreasonable risk of danger’ in Proposition 47 is appropriate because the inmates who stand to benefit from Proposition 47 are now considered misdemeanants, or they would have been if they had

committed their crimes after the passage of Proposition 47.” (*Ibid.*) However, as the *Esparza* court explained, it is not reasonable to apply that same definition to three strike offenders: “As misdemeanants, in general, they as a class are less dangerous than recidivist felons with prior strike offenses. It is axiomatic that a felony is a more serious type of crime than a misdemeanor. It would be illogical to believe that the electorate intended to change Proposition 36 when in Proposition 47 it redefined some felonies as misdemeanors; to do so would be to treat felons whose underlying third crime is still a felony if committed today as if they were now misdemeanants.” (*Ibid.*)

Finally, interpreting section 1170.18, subdivision (c) to apply to a petition filed under Proposition 36 would lead to absurd results because Proposition 36 contains a sunset clause the effect of which would limit application of the Proposition 47 definition to a small and arbitrary group of Proposition 36 petitioners. (*Esparza, supra*, 242 Cal.App.4th at p. 737.) As the *Esparza* court explained, “[w]ithout a showing of good cause, a three strikes inmate had until November 7, 2014 (two days after Prop. 47 became effective), to file a petition for recall of sentence. [Citation.] Without a showing of good cause, the only ‘petitioners’ who are able to petition for recall of sentence after November 7, 2014, are those who are eligible to petition for recall under [Proposition 47].” (*Ibid.*)

In light of these circumstances, the *Esparza* court concluded: “Before we constrain a court considering whether to release a former three strikes offender back to the streets, which we would do if we accepted defendant’s arguments, we would need the most compelling proof that the voters intended what we see as an unreasonable and counterintuitive result.” (*Esparza, supra*, 242 Cal.App.4th at p. 737.) Absent that proof, the court rejected the contention that Proposition 47’s definition of unreasonable risk of danger to public safety applies to petitions for resentencing under Proposition 36. (*Ibid.*)

We are persuaded by *Esparza* and adopt its reasoning here. Therefore, we conclude that the trial court did not commit an error by applying the criteria set forth in section 1170.126, subdivisions (f) and (g), rather than the more restrictive standard set

forth in section 1170.18, subdivision (c), when it exercised its discretion to determine whether resentencing Britten would pose an unreasonable risk of danger to public safety.

IV. DISPOSITION

The appealed orders are affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

A143848, *People v. Britten*